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IN THIS OFFICE
Clerk U. S. District Court
Greensboro, N. C.
By _____

1:02CV00546

MEMORANDUM OPINION

OSTEEN, District Judge

This loan credit agreement dispute, removed on the basis of federal question pursuant to 28 U.S.C. § 1331, is before the court on Defendant's motion to dismiss pursuant to Rules 9 and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs Gregory Lee Davis and Maria Rodriguez Davis, acting pro se, assert violations by Defendant Dillard National Bank ("Dillard") of the Uniform Commercial Code, Truth in Lending Act, Fair Debt Collection Practices Act, Racketeer Influenced and Corrupt Organizations Act ("RICO"), Equal Protection Clause of the United States Constitution, and claims of bank fraud, mail fraud, wire fraud, insurance fraud, conversion, intentional interference with contract, tax evasion, conspiracy, and solicitation. For the

reasons stated herein, the court will grant Defendant's motion to dismiss.

I. BACKGROUND

The following facts are presented in the light most favorable to Plaintiff.¹ Plaintiffs and Dillard entered into a loan credit agreement in which Dillard agreed to extend Plaintiffs credit and Plaintiffs agreed to repay Dillard according to the terms of the agreement.² Although the record does not indicate when or how Plaintiffs were notified that their balance was due, Plaintiffs do in fact admit that they were indebted to Dillard. Plaintiffs' suggested method of paying off their debt was to seek a "verification" and "validation" of the total amount owed to Dillard. Plaintiffs allege that the debt was extinguished when Dillard failed to provide verification and validation of the debt.

¹ Although the factual record is quite sparse overall, the majority of facts offered by Plaintiffs are contained in the attachments to the complaint, as opposed to the complaint itself. Items attached to the complaint are appropriate considerations for the court in deciding a motion to dismiss pursuant to Rule 12(b)(6). 5A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure: Civil 2d § 1357; Norfolk Fed'n of Bus. Dists. v. City of Norfolk, 1996 WL 671293, at *1 (4th Cir. Nov. 20, 1996). Thus, the court's treatment of the factual background will center primarily on the attachments to Plaintiffs' complaint.

² The actual loan credit agreement is not a part of the record; the total amount of the loan and the dates of the transaction are also absent from the record.

Plaintiffs sent Dillard a "Private Notice of Offer Pending Verification" in which they indicated that unless Dillard verified the debt within three days, it would be "in fault." Plaintiffs' notice indicated that such "fault" would signify Dillard's refusal to honor Plaintiffs' good faith offer to pay the debt. In explaining the effect of Dillard's failure to acknowledge the verification request, Plaintiffs asserted that "when an [o]ffer to pay off a debt is refused, the debt is discharged to the extent of the amount offered."

Three days after sending the verification notice, Plaintiffs allege that they sent Dillard a "Private Notice of Fault with Opportunity to Cure." This document indicated that Dillard was in fact "in fault" for not providing verification of the debt. Plaintiffs granted Dillard an additional three days to cure the requested verification. Plaintiffs claim that they received no response from Dillard.

Several weeks later, Plaintiffs allege that they sent Dillard a "Private Notice of Default." This document indicated that the prior debt was now fully discharged and that Dillard was prevented from reporting adverse information about Plaintiffs to the credit bureau. Plaintiffs also allegedly sent Dillard a "Demand for Discharge of Alleged Debt" in which Plaintiffs demanded a response within five days of receipt of the notice

showing that Plaintiffs' balance was zero. Plaintiffs further threatened that Dillard's failure to respond within five days could result in "confinement in state and/or federal prison." Plaintiffs also alleged in this demand letter that Dillard's actions might have caused damages "by impeding commerce, interference of contracts, recording false documents, mail fraud, wire fraud, conversion, conspiracy, solicitation, bank fraud, insurance fraud, tax evasion, equal protection under the law and other RICO violations."

Plaintiffs do not allege whether Dillard received these notices and/or assented to any agreement as referenced in the notices. Rather, Plaintiffs claim that by virtue of the Uniform Commercial Code's provisions relating to tender that Dillard automatically agreed to discharge the debt when it did not reply to the verification notices. Plaintiffs seek \$768,669 in monetary damages in addition to asserting that their outstanding balance of \$2,254.85 has been discharged based on Dillard's failure to verify the debt.

Dillard filed a counterclaim for breach of the loan credit agreement because of Plaintiffs' failure and refusal to repay the amount of debt due (\$2,254.85) plus interest. Plaintiffs have not filed a reply to this counterclaim. Similarly, despite

appropriate notice from the clerk's office, Plaintiffs have not responded to Dillard's motion to dismiss.³

II. STANDARD OF REVIEW

A court should dismiss a case for failure to state a claim upon which relief can be granted "only in very limited circumstances." Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). When considering a motion to dismiss, the court must evaluate the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded factual allegations. Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994). Because pleadings drafted by pro se claimants are held to less rigorous standards than pleadings drafted by attorneys, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957)).

³ According to Local Rule of Civil Practice 7.3(k), "if a respondent fails to file a response . . . the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." The rule does not make an exception for plaintiffs proceeding pro se. Despite this technical rule in favor of granting the motion to dismiss, the court will address the merits of Plaintiffs' claim because they are proceeding pro se.

III. ANALYSIS

According to Rule 8(a) of the Federal Rules of Civil Procedure, a claim is pled sufficiently when the defendant has fair notice of the nature of the claim. Barbee v. Coble, 208 F.R.D. 549, 551 (M.D.N.C. 2002). A plaintiff need not establish the substantive elements of a claim in the complaint to survive a motion to dismiss. Id. However, a court need not accept the legal conclusions in a complaint because such allegations are questions of law for the decision of the court. District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp., 609 F.2d 1083, 1085-86 (4th Cir. 1979). "Footless conclusions of law" predicated upon unwarranted inferences in a complaint will not be admitted by the court on a Rule 12(b)(6) motion. Ryan v. Scoggin, 245 F.2d 54, 57 (10th Cir. 1957). Because the purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint, claims must fail as a matter of law if they are based on an unsupportable legal theory. See id.

The legal theory underlying all of Plaintiffs' claims is that they are entitled to relief because their debt was discharged properly. This legal theory is based on Plaintiffs' application of section 3-603 of the Uniform Commercial Code.⁴

⁴ North Carolina Uniform Commercial Code's identical provision is located at N.C. Gen Stat. § 25-3-603.

Section 3-603(a) states that "[i]f a tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract." U.C.C. § 3-603(a). Under North Carolina contract law, tender occurs when an actual presentment of funds sufficiently extinguishes the entire debt. See Parks v. Jacobs, 259 N.C. 129, 130, 129 S.E.2d 884, 885 (1963). Merely offering to produce payment or showing a readiness to perform is insufficient to establish tender; actual production of payment is necessary. Id.

Here, Plaintiffs allege only that they proposed or offered to pay the debt. There is nothing in the factual record to support actual payment of the debt. Plaintiffs erroneously argue that their offer to pay the debt, and Dillard's refusal to verify the debt, extinguish the debt altogether. To the contrary, no payment of the debt was made, and thus no tender occurred; therefore, Plaintiffs' claim that their debt was extinguished pursuant to section 3-603 of the Uniform Commercial Code fails as a matter of law.

Even if the factual record supported the tender requirement of actual payment, Plaintiffs' legal theory of relief still fails

as a matter of law. According to section 25-3-603(b) of North Carolina's Uniform Commercial Code,

[i]f tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.

N.C. Gen. Stat. § 25-3-206(b) (emphasis added). "Indorser" is an individual who makes an indorsement; it requires a signature "other than that of a signer as maker, drawer, or acceptor . . . for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument" N.C. Gen. Stat. § 25-3-204(a). "Accommodation party" is an individual who "signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument." N.C. Gen. Stat. § 25-3-419(a). Plaintiffs do not allege that they are the indorsers or accommodation parties; rather, Plaintiffs concede that they are directly indebted to Dillard. Therefore, Plaintiffs are not entitled to discharge of their debt because they are neither indorsers nor accommodation parties pursuant to N.C. Gen. Stat. §§ 25-3-603(b), 25-3-204(a), and 25-3-419(a). Plaintiffs' claim that their debt

is discharged under these Uniform Commercial Code provisions is legally unsupportable, and therefore, fails as a matter of law.

Plaintiffs' RICO claim derives from their erroneous Uniform Commercial Code theory involving the discharge of their debt. In the documents attached to the complaint, Plaintiffs allege that Dillard committed "other RICO violations." Besides this legal conclusion and the factual assertions involving the Uniform Commercial Code claim, Plaintiffs do not offer any facts to support their vague RICO claim. Plaintiffs have not only failed to allege any of the elements of a RICO claim, but the only support offered is an erroneous legal theory surrounding the discharge of their debt. Therefore, Plaintiffs' RICO claim fails as a matter of law.

Plaintiffs also allege that Dillard violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692g, because Dillard failed to verify the debt. This section, entitled "Validation of Debts," applies exclusively to "debt collectors" and requires verification of the amount of debt in the event of a debtor dispute. According to section 1692a(6)(A), however, "any officer or employee of a creditor while, in the name of the creditor, collect[s] debts for such creditor" is excluded from the definition of debt collector.

Crediting institutions, such as banks, are not debt collectors under section 1692a(6)(A) because they collect their own debts and are in the business of lending money to consumers. Thomasson v. Bank One, Louisiana, N.A., 137 F. Supp. 2d 721, 724 (E.D. La. 2001); Meads v. Citicorp Credit Servs., Inc., 686 F. Supp. 330, 333 (S.D. Ga. 1988). Because Dillard is a bank engaged primarily in the business of lending money to individuals instead of collecting debts, it is not subject to the Fair Debt Collection Practices Act. Therefore, Plaintiffs' Fair Debt Collection Practices Act fails as a matter of law.

Plaintiffs' equal protection claim fails as a matter of law for an additional reason. Constitutional guarantees, such as equal protection under the law, do not apply to the actions of private entities. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619, 111 S. Ct. 2077, 2082 (1991); Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 341 (4th Cir. 2000). In an equal protection case, the defendant must be a state actor for the claimant to be entitled to legal relief. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50, 119 S. Ct. 977, 985 (1999). Dillard, a private bank, is not a state actor. Therefore, as a matter of law, Plaintiffs' equal protection claim fails.

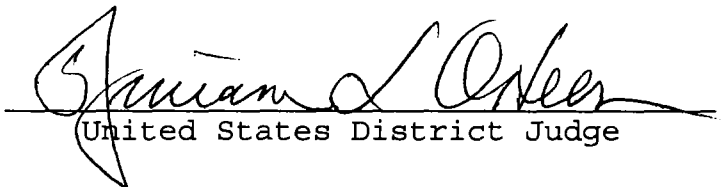
As to Plaintiffs' remaining claims under the Truth in Lending Act, bank fraud, mail fraud, wire fraud, insurance fraud, conversion, intentional interference with contract, tax evasion, conspiracy, and solicitation, Plaintiffs offer no additional factual assertions to support the claims; nothing more than legal conclusions are alleged. Therefore, because Plaintiffs' Truth in Lending Act, bank fraud, mail fraud, wire fraud, insurance fraud, conversion, intentional interference with contract, tax evasion, conspiracy, and solicitation claims allege only legal conclusions without factual support, these claims fail as a matter of law. District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp., 609 F.2d 1083, 1085-86 (4th Cir. 1979); Mescall v. Burrus, 603 F.2d 1266, 1269 (7th Cir. 1979).

IV. CONCLUSION

For the reasons set forth above, the court will grant Defendant Dillard National Bank's Motion to Dismiss.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 4th day of June 2003.


United States District Judge